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Mohd Azran bin Rahmat & Anor v Mazlan bin Aliman

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO C-01–396–11 OF 2013
ABDUL WAHAB PATAIL, HAMID SULTAN AND UMI KALTHUM JJCA
24 MARCH 2015

C

Tort — False imprisonment — Arrest without warrant — Allegation of criminal trespass — Whether alleged trespasser had consent to be in premise — Alleged trespasser arrested by police — Whether arrest legal and valid

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The respondent was arrested on the ground of an alleged criminal trespass under s 441 of the Penal Code. A police report was made and at the time of the arrest, all investigations and statements of witnesses had been completed. Subsequent remand was sought and obtained on the following day. The respondent claimed for damages against the appellants at the High Court and

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submitted that the subsequent remand sought and obtained was defective and invalid as it was tainted upon incorrect allegation of criminal trespass; and the appellants had perpetrated wrongful arrest and illegal detention between 9 March 2010 until 11 March 2010. Satisfied that the arrest and further remand were illegal, the High Court judge found in favour of the respondent

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and awarded general and exemplary damages and costs. Hence, the present appeal.

Held, allowing the appeal:

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(1) **(per Abdul Wahab Patail JCA, majority)** The police is bound to conduct investigations to determine whether there were reasonable suspicion that an offence had been committed to enable the police to give the status report to the person who had given the information under s 107 of the Criminal Procedure Code ('the CPC'). It is not for the police

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to determine whether in fact, an offence had been committed or not despite a person investigated or an accused being certain from his point of view that he has not committed any offence (see para 16).

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(2) **(per Abdul Wahab Patail JCA, majority)** The fact remains under the CPC, where there is an information filed, the police is duty-bound to investigate and give a status report to the person who had given the information under s 107 if he so requests it. A reasonable suspicion that an offence is committed is sufficient to require the police to proceed to complete the investigation and put the matter to the court to determine whether an offence as charged, had been committed or not. The final

charge itself could only be formulated after the investigations had been completed (see para 16).

(3) **(per Hamid Sultan JCA, dissenting)** If sensible judgment had been applied by the police, they would have come to the conclusion that there was consent by the person in possession and/or constructive possession of the premise, notwithstanding that they might not be owners of the property and in consequence, a report would be frivolous, vexatious and abuse of criminal process (see para 36).

[Bahasa Malaysia summary

Responden ditangkap atas alasan pencerobohan jenayah yang didakwa di bawah s 441 Kanun Keseksaan. Laporan polis telah dibuat dan pada masa penangkapan, kesemua siasatan dan pernyataan saksi-saksi telah selesai. Reman kemudiannya telah dipohon dan diperolehi pada hari berikutnya. Responden menuntut untuk ganti rugi terhadap perayu-perayu di Mahkamah Tinggi dan berhujah bahawa reman yang dipohon dan diperolehi kemudiannya adalah cacat dan tak sah kerana ia dicemar atas dakwaan salah terhadap pencerobohan jenayah; dan perayu-perayu telah melakukan penangkapan salah dan penahanan menyalahi undang-undang di antara 9 Mac 2010 sehingga 11 Mac 2010. Berpuas hati bahawa penangkapan dan reman selanjutnya adalah menyalahi undang-undang, hakim Mahkamah Tinggi mendapati memihak responden dan mengawardkan ganti rugi am dan teladan dan kos. Maka, rayuan ini.

Diputuskan, membenarkan rayuan:

(1) **(oleh Abdul Wahab Patail HMR, majoriti)** Polis adalah terikat untuk menjalankan siasatan-siasatan untuk menentukan sama ada terdapat kesangsian yang munasabah bahawa kesalahan telah dilakukan untuk membolehkan polis memberi laporan status kepada orang yang telah memberi maklumat di bawah s 107 Kanun Tatacara Jenayah ('KTJ'). Ia bukan untuk polis untuk menentukan sama ada sebenarnya, kesalahan telah dilakukan atau bukan disebabkan seseorang disiasat atau tertuduh pasti daripada pandangannya bahawa dia tidak melakukan apa-apa kesalahan (lihat perenggan 16).

(2) **(oleh Abdul Wahab Patail HMR, majoriti)** Fakta kekal di bawah KTJ, di mana terdapat maklumat difailkan, polis adalah bertanggungjawab untuk menyiasat dan memberi laporan status kepada orang yang telah memberi maklumat di bawah s 107 jika dia memohonnya. Kesangsian munasabah bahawa kesalahan dilakukan adalah mencukupi untuk memerlukan polis meneruskan untuk menyelesaikan siasatan dan membawa perkara tersebut kepada mahkamah untuk menentukan sama ada kesalahan telah didakwa, telah dilakukan atau tidak. Tuduhan

muktamad itu sendiri hanya boleh dirumuskan selepas sisatan-siasatan telah selesai (lihat perenggan 16).

(3) **(oleh Hamid Sultan HMR, menentang)** Jika penghakiman yang wajar telah diguna pakai oleh polis, mereka akan mencapai kepada keputusan bahawa terdapat izin oleh orang yang dalam milikan dan/atau milikan konstruktif terhadap premis, meskipun mereka bukan pemilik-pemilik hartanah dan akibatnya, laporan akan menjadi remeh temeh, menyusahkan dan penyalahgunaan proses jenayah (lihat perenggan 36).]

Notes

For cases on false imprisonment in general, see 12(1) *Mallal's Digest* (5th Ed, 2015) paras 926–954.

Cases referred to

Chong Fook Kam & Anor v Shaaban & Ors [1968] 2 MLJ 50; [1968] 1 LNS 23, FC (refd)

Nurasmira Maulat bt Abd Jaffar & Ors v Ketua Polis Negara & Ors [2015] 3 MLJ 105; [2015] 2 CLJ 231, CA (refd)

PP v Mohamed Ali [1962] 1 MLJ 257; [1962] 1 LNS 129 (refd)

Rookes appellant; and Barnard and others respondents [1964] AC 1129, HL (refd)

Selvaduray v Chinniah [1939] MLJ 253 (refd)

Shaaban & Ors v Chong Fook Kam & Anor [1969] 2 MLJ 219, PC (refd)

Wong Sieng Ping v PP [1967] 1 MLJ 56 (refd)

Zainal bin Kuning & Ors v Chan Sin Mian Michael & Anor [1996] 3 SLR 121, CA (refd)

Legislation referred to

Courts Ordinance 1948 s 107(1)

Criminal Procedure Code ss 107, 107(1), 107A, 110, 117, 387, 388, First Schedule, Part V, Chapter XIII

Federal Constitution

Penal Code ss 441, 447

Appeal from: Civil Suit No 21–5 of 2010 (High Court, Temerloh)

Ahmad Hanir Hambaly (Senior Federal Counsel, Pahang State Legal Advisor Offices) for the appellants.

Wan Rohimi Wan Daud (Mohd Faizi Che Abu and Asmadi Abu Bakar with her) (Tengku Amalin 'A-Ishah Putri, Faizi & Wan Rohimi) for the respondent.

Abdul Wahab Patail JCA (delivering majority judgment of the court):

[1] The first and second appellants, Mohd Azran bin Rahmat, a police inspector and Kerajaan Malaysia respectively ('the appellants') were named the first and second defendants in Civil Suit No 21–5 of 2010 ('the civil suit') before the High Court in Temerloh commenced by the respondent Mazlan bin Aliman ('the respondent'). Satisfied that the arrest and further remand was illegal, the High Court awarded the sum of RM300,000 as general damages, RM50,000 as exemplary damages and costs RM20,000.

[2] The appellants appealed to this court. By a majority decision, the appeal was allowed, the decision of the High Court was set aside, and costs awarded in the sum of RM5,000. The minority decision would allow the appeal in part by reducing the award of general damages of RM300,000 to RM5,000, and the exemplary damages of RM50,000 is maintained.

[3] The cause of action relied upon by the respondent as plaintiff in the civil suit is in the tort of false imprisonment. The cause of action was founded upon the assertions that:

(a) the respondent was arrested at 10.30pm on 9 March 2010 on the ground of an alleged criminal trespass upon which a police report No SG RUAN/000192/10 was made, and at the time of arrest, all investigations and statements of witnesses had been completed;

(b) the subsequent remand sought and obtained on 10 March 2010 was defective and invalid as it was tainted upon an incorrect allegation of criminal trespass; and

(c) accordingly, the appellants had perpetrated wrongful arrest and illegal detention between 10.30pm on 9 March 2010 until 11 March 2010.

[4] The fundamental issue was whether the arrest was made on reasonable suspicion that an offence has been committed. See *Chong Fook Kam & Anor v Shaaban & Ors* [1968] 2 MLJ 50; [1968] 1 LNS 23, (FC).

[5] The offence concerned for which he was arrested was criminal trespass under s 441 of the Penal Code and punishable under s 447 which provide as follows:

> Whoever enters into or upon property in the possession of another with intent to commit any offence or to intimidate, insult or annoy any person in possession of such property; or having lawfully entered into or upon such property, unlawfully remains there with intent thereby to intimidate, insult or annoy any such person or with the intent to commit an offence, is said to commit 'criminal trespass.
>
> Whoever commits criminal trespass shall be punished with imprisonment for a

A term which may extend to six months or with fine which may extend to three thousand ringgit or with both.

[6] The High Court reasoned that:

B (a) both limbs of s 441 speak of 'property in possession of another', but it can be immediately ascertained the manager who had lodged a report could not with any stretch of imagination be said to be in the possession of the whole Felda Lembah Klau;

C (b) in this case, since the public hall was not used and there was also no attempt to use the hall, no discernible offence could be detected;

(c) the Felda scheme is not a restricted zone or *gazetted* as such. Therefore any member of the public could enter the settlement for any valid purpose. Even to hold a dialogue with the settlers could not amount to committing D of an offence or insulting or annoying any person;

(d) the action of the respondent in talking with the settlers did not fall foul of the second limb. SP2 the owner of the residence and the person effectively in possession of the property had consented for his premise to E be used. The plaintiff having obtained consent of the owner could not be said to have unlawfully remained at the premise. SP2 had in fact gone to the police station with the respondent to clarify this matter;

(e) in short, there was no recognisable offence committed by the respondent F empowering the first appellant from arresting him. To add salt to injury, the first appellant dragged the respondent before the magistrate and obtained a further remand order for a non existing offence. This was a clear abuse of power by the first appellant;

(f) in this case, the first appellant had failed to determine the veracity of the G complaint of the Manager of Felda before proceeding to arrest the respondent. Even a more rash action on the part of the first appellant was to ignore the facts and statement of the witnesses from whom he had recorded statements, pointing to the innocence of the respondent. The first appellant had clearly acted mala fide in arresting and detaining the H plaintiff. Taking a leaf from the case of *Chong Fook Kam* where the court took the following stand: ... ; and

(g) the High Court was satisfied that the respondent had proved that his arrest and the further remand was illegal.

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[7] It was submitted for the respondent that the alleged criminal trespass did not happen because:

(a) s 441 requires there must be entry into or upon the property in the possession of another but the first appellant having completed the

investigations knew that the respondent had not committed criminal trespass of Balai Raya Felda Lembah Klau, because the Majlis Dialog that was promoted by Syhamsul Fauzi bin Man ('Fauzi') with settlers of Felda Lembah Klau;

(b) at all times the Majlis Dialog did not occur because the promoter did not obtain permission to use the Balai Raya Felda Lembah Klau and did not obtain a police permit, and was cancelled by the promoter;

(c) the appellant was given permission by Hamidun bin Yeop Isa ('SP2') to proceed to his house to socialise with about 15–20 settlers, Fauzi and SP2, who was the registered proprietor of his house;

(d) while they were there, the polis bantuan Felda, the Felda Manager Awang bin Sulong, and the police arrived, whereupon the informal program of socialising with the settlers was terminated, and they accompanied the Felda Manager to IPD Raub to make a police report;

(e) after a police report No SG RUAN/000192/10 was recorded, the first appellant recorded the statement of the Felda Manager at about 3pm, again at about 7pm for a second time, and then between after Magrib until about 10.30pm recorded the oral statement of the respondent;

(f) at about 5.45pm the respondent lodged a Police Report No SG RUAN/000194/10;

(g) at 10pm the first appellant had spent between 30 minutes to an hour to record the statement of SP2, who told the first appellant he was the registered owner of the house they were socialising in;

(h) after that the statement of Fauzi was recorded; and

(i) the respondent was arrested at the first floor of IPD Raub.

[8] The last was not undisputed. It was the evidence of the first appellant that the respondent was arrested in front of Bangunan Inderapura, Jalan Tras at about 11.15pm by him and a detachment of nine policemen. It was submitted for the respondent that police report No RAUB/000865/10 of the arrest in front of Bangunan Inderapura, Jalan Tras at about 11.15pm by first appellant and a detachment of nine policemen was false.

[9] The allegation that the police report No RAUB/000865/10 was false was summed up in submissions as follows:

30. Adalah tidak munasabah SD1 yang ketika itu sedang sibuk mengambil keterangan SP2 dan Fauzi, boleh keluar dari IPD Raub bersama 9 anggota yang lain kononnya untuk menangkap SP1.

31. Bahkan SD1 sendiri mengakui dalam soal balas bahawa beliau mula mengambil keterangan SP2 lebih kurang jam10.0 malam. SD1 mengakui tempoh masa untuk

ambil keterangan adalah antara 30 minit hingga sejam. Sejurus selepas keterangan SP2 diambil, SD1 sekali lagi mengakui bahawa beliau kemudiannya mengambil keterangan daripada Fauzi, dalam tempoh masa antara 30 minit hingga sejam.

32. Mengambil kira keadaan dan pada masa antara mengambil keterangan SP2 dan Fauzi yang bermula jam 10.0 malam, serta untuk memanggil 9 anggota untuk menangkap SP1 kononnya di hadapan Bangunan Inderapura, Jalan Tras, adalah merupakan satu pembohongan yang mempunyai motif jahat.

33. Sedangkan Plaintif melalui keterangannya telah menyatakan beliau tidak pernah keluar dari IPD Raub sejak beliau sampai untuk membuat Laporan Polis pada jam 5.45 petang hinggalah dimaklumkan tentang tangkapan.

34. Keterangan Plaintif disokong oleh SP2 yang melihat dan bersama dengan Plaintif sejak SP2 sampai di IPD Raub pada jam 9.30 malam.

35. Selanjutnya, SD1 langsung tidak memanggil mana-mana seorang dari 9 anggota JSJ Raub yang kononnya bersama beliau membuat tangkapan di hadapan Bangunan Inderapura, Jalan Tras, untuk menyokong keterangan beliau.

36. Keengganan SD1 memanggil mana-mana seorang dari 9 anggota JSJ Raub tersebut, hanyalah menunjukkan kecurangan dan penipuan maklumat tangkapan oleh SD1.

37. Oleh yang demikian, penemuan fakta yang dibuat oleh YA Hakim yang bijaksana berkenaan isu ini adalah sangat tepat dan tidak perlu diganggu:

> On this issue I believed the evidence of the plaintiff as I believe on the night of 9 March 2010 until late night he was at the Police Station and the 3rd Defendant was still there. To me, it made sense for the 3rd Defendant to allow the plaintiff to leave the police station and then follow him to arrest him at another place. Again on this issue what was important to decide was as to why the plaintiff was arrested at all.

DELIBERATION AND CONCLUSION

[10] We observed that although the basic issue in the cause of action relied on is whether there was reasonable suspicion that an offence has been committed, the case went on to submissions of 'pembohongan yang mempunyai motif jahat', dispute as to when arrest was made, and failure to call any of the detachment of nine policemen to testify against the version of the respondent and SP2, that the arrest was made at 10.30pm at IPD Raub 'hanyalah menunjukkan kecurangan dan penipuan maklumat tangkapan oleh SD1'. These submissions were relevant for the claim of exemplary damages, but care must be taken to assess it separately because it is irrelevant to the determination of the primary question whether there was reasonable suspicion that an offence has been committed, which is the foundation of the cause of action before damages and exemplary damages may follow.

[11] As the part of the grounds of judgment of the High Court excerpted in the submissions for the respondent reproduced above shows, belief in the allegations led the High Court to colour its finding as to whether there was reasonable suspicion that an offence has been committed to warrant the arrest. The basis of judicial findings of fact is an objective test as to whether relevant admissible evidence proved upon a balance of probabilities the facts relied upon in a plaintiff's cause of action. Relevant admissible evidence is accepted. Credibility is assessed. Belief is a very subjective test, fraught with the risk of leading an objective assessment astray.

[12] We observed further that although *Chong Fook Kam & Anor v Shaaban & Ors* was referred to as the *locus classicus*, the following part of the judgment appeared to have been missed:

> An order of a magistrate authorising the detention of the arrested person beyond the period of 24 hours made under s 117 is a judicial act and cannot found a claim for damages against the magistrate because of s 107(1) of the Courts Ordinance 1948, which reads:
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> > No magistrate or other person acting judicially shall be liable to be sued in any civil court for any act done or ordered to be done by him in the discharge of his judicial duty, whether or not within the limits of his jurisdiction, nor shall any order for costs be made against him, provided that he at the time in good faith believed himself to have jurisdiction to do or order the act complained of.
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> Nor may such an order found a claim for damages against a police officer because s 41(1) of the Police Ordinance No 14 of 1952 (now s 32(1) of the new Police Act No 41 of 1967) provided:
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> > Where the defence to any suit instituted against a police officer is that the act complained of was in obedience to a warrant purporting to be issued by any competent authority, the court shall, upon production of the warrant containing the signature of such authority and upon proof that the act complained of was done in obedience to such warrant, enter judgment in favour of such police officer.
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> In view of these provisions, counsel for the plaintiffs was right in not claiming damages in respect of the detention following the Magistrate's detention order.

[13] In this case, a remand order was obtained the next day after the arrest in the evening of 9 March 2010, yet the claim was for damages for false imprisonment until 11 March 2010. The ground the first appellant proceeded with the remand application, as submitted before us by the respondent was:

> 56. Walau pun Defendan Pertama (the first appellant), yang telah mengetahui keseluruhan keterangan sebelum membuat tangkapan ke atas Plaintif (the respondent), dengan ketiadaan kesalahan oleh Plaintif (the respondent) berkenaan dengan siasatan bagi pencerobohan jenayah (criminal trespass) di bawah s 441 dan s 447 Kanun Keseksaan, masih meneruskan permohonan reman atas kesalahan yang tidak wujud dan sengaja di ada-adakan.

[14] Thus, it went back to the premise that needs to be established by the respondent as the appellant, that there was no reasonable suspicion that an offence has been committed. The magistrate at the remand application had issued the remand order only if the magistrate agreed, whether right or wrong, that there was reasonable grounds for suspicion that an offence had been committed, and further investigation was required to dispose of it one way or another.

[15] Part V Chapter XIII of the Criminal Procedure Code ('the Code') provides as to information to the police and their powers to investigate. The police reports made fall within the meaning of information relating to the commission of an offence under s 107 of the Code. The Criminal Procedure Code (Amendment) Act 2006 effective 7 September 2007 inserted s 107A which provides that any person who has given information under s 107 may request for a report on the status of the investigation of the offence complained of in his information from the officer in charge of a police station where he gave the information, and the officer in charge of a police station shall give a status report on the investigation of such offence to the informant not later than two weeks from the receipt of the request made under sub-s (1).

[16] In short, the police is bound to conduct investigations to determine whether there were reasonable suspicion that an offence had been committed to enable the police to give the status report to the person who had given the information under s 107. It is not for the police to determine whether in fact an offence has been committed or not despite a person investigated or an accused being certain from his point of view that he has not committed any offence. The fact remains that under the Code, where there is an information filed, the police is duty bound to investigate and give a status report to the person who had given the information under s 107 if he so requests it. A reasonable suspicion that an offence is committed is sufficient, to require the police to proceed to complete the investigation and put the matter to the court to determine whether an offence as charged has been committed or not. The final charge itself can only be formulated after the investigations had been completed.

[17] Although the Majlis Dialog was not carried out because neither approval was given for the use of the Balai Raya Felda Lembah Klau, nor police permit obtained for the Majlis Dialog, the arrival of the respondent with Fauzi, the promoter at the Balai Raya Felda Lembah Klau in such circumstances give reasonable grounds for suspicion that an offence was being committed although it was not carried out to completion. If neither approval nor police permit had been obtained, there was no reason for the respondent and Fauzi to arrive at the Balai Raya Felda Lembah Klau.

[18] That there was no evidence that the Felda Manager had authority to grant approval is, in our view, entirely irrelevant, for the fact is that it was admitted there was no approval for the use of the Balai Raya Felda Lembah Klau for the Majlis Dialog and hence there was reasonable grounds for suspicion that an offence under s 441 punishable under s 447 of the Penal Code was committed. The respondent was not a person unlikely to conduct a dialogue. He was the President of an NGO known by the acronym ANAK ('Persatuan Anak-anak Peneroka Kebangsaan') linked to Felda settlers.

[19] That there were divergent evidence clearly demanded investigation. It remains that there was a report by the Felda Manager that the police were duty bound to investigate. Obviously it is not unexpected there would be divergent versions. That made it necessary, after the versions were recorded, to decide what to do next to conduct further investigations. That the authority charged with the duty to conduct the investigations is being cast and pilloried instead as an opponent is much to be abhorred. In *Public Prosecutor v Mohamed Ali* [1962] 1 MLJ 257; [1962] 1 LNS 129, Thomson CJ has this to say of police witnesses:

> When a police witness says something that is not inherently improbable his evidence must in the first instance be accepted. If his evidence is contradicted by other evidence or is shaken by cross-examination, then it becomes the business of the Magistrate to decide whether or not it should be accepted. In the absence of contradiction, however, and in the absence of any element of inherent probability the evidence of any witness, whether a police witness or not, who gives evidence on affirmation, should normally be accepted.

[20] The evidence of the appellant was supported by a contemporaneous police report against which there was no evidence adduced of any information or complaint filed that it was a false report. Thus, though alleged to be false, it remained evidence that could be taken into consideration.

[21] For the foregoing reasons, we concluded that the reasoning of the High Court was flawed. It had erred affecting the merits of the case. The majority, therefore, allowed the appeal, set aside the decision of the High Court, and awarded costs in the sum of RM5,000 to the appellants.

Hamid Sultan JCA (delivering dissenting judgment of the court):

[22] The appellants appeal against the decision of learned High Court judge who found in favour of the respondent in an action for false imprisonment and awarded the sum of RM300,000 as general damages and RM50,000 as exemplary damages and costs of RM20,000, which came up for hearing on 23 October 2014. Upon hearing the appeal, the majority allowed the appeal and set aside the order of the High Court. I took the view that the appeal

should only be allowed in part as to quantum and not liability. Accordingly, I reduce the sum of RM300,000 on general damages (as it was not established according to law) to RM5,000 and sustained exemplary damages of RM50,000

[23] My learned brother Abdul Wahab Patail wrote the judgment for the majority and it was dated 24 March 2015, though it was only brought to my attention on 29 February 2016.

[24] I have read the said judgment and in consequence will not repeat the facts of the case, save to say, the majority judgment must be read together to appreciate this judgment in the right perspective.

[25] The core issues for consideration in this appeal is that (a) whether there was 'reason to suspect' commission of an offence; and (b) whether bail ought to have been granted in any event.

[26] The offence that the respondent was investigated into was under s 441 and the pursuant to is s 447 of the Penal Code. Both the sections read as follows:

> 441 Criminal trespass
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> Whoever enters into or upon property in the possession of another with intent to commit an offence or to intimidate, insult or annoy any person in possession of such property; or having lawfully entered into or upon such property, unlawfully remains there with intent thereby to intimidate, insult or annoy any such person, or with intent to commit an offence, is said to commit 'criminal trespass'.
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> 447 Punishment for criminal trespass
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> Whoever commits criminal trespass shall be punished with imprisonment for a term which may extend to *six months or with fine which may extend to *three thousand ringgit or with both.

[27] Criminal trespass is a summons case and is bailable and compoundable, as per the First Schedule to the Criminal Procedure Code. First schedule of the CPC for s 447 of the Penal Code reads as follows:

Criminal Trespass						
447	Criminal trespass	May arrest without warrant	Summons	Bailable	Compoundable	Imprisonment for six months, or fine of three thousand ringgit, or both.

Learned authors of *Janab's Key To Criminal Procedure Code*, (3rd Ed), at p 92

stated that:

> Under the first schedule of the code offences punishable with death or imprisonment of above three years are generally described as seizable offence. Offences punishable with below three years under the Penal Code or below five under other Acts are generally described as non-seizable offence. Thus, seizable offences are more serious offences in contrast with non-seizable offences. Some statutes may have provision for police officers or other persons to arrest without warrant notwithstanding it may be a non-seizable offence.

And at p 98:

> It must be emphasised that the classification of bailable and non- bailable offence is to ensure that an accused is given bail immediately in less serious offence and to ensure the law enforcement agencies do not abuse their powers of arrest and detention. The scope of section 117 of the code is meant to allow the police to detain a person for investigation in cases of serious offence. To say otherwise will totally destroy the right of bail entrenched in section 387 of the code. If the subject matter of the police investigation is in respect of a bailable offence then the right to bail must prevail and Magistrate must ensure that they do not exercise their discretion to remand a person under section 117 of the code and allow the section to be abused by law enforcement agencies.
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> Non-bailable offence means an offence shown as non-bailable in the First Schedule or which is made non-bailable by any other law for the time being in force. In brief, it means any other offence other than bailable which does not include unbailable offence. Unlike unbailable offence', non-bailable offence does not mean that the accused can never be granted bail but it only means the accused cannot claim bail as of right.
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> The court is unlikely to grant bail in a non-bailable offence where the prosecution can demonstrate to the court, by way of evidence or otherwise that, the accused will fail to surrender to custody; or commit an offence while on bail; or interfere with witnesses or otherwise obstruct the cause of justice, whether in relation to himself or any other person; or the accused should be kept in custody for his own protection.

[28] The respondent, in this case, was not arrested pursuant to a warrant by a magistrate. The respondent was alleged to have committed a criminal trespass under s 447 of the Penal Code in an occasion where he was having a dialogue with the settlers of Felda scheme. Dialoge per se relates to fundamental rights in the Federal Constitution. The respondent was in the alleged premise with the consent of one of the occupants of the premise, though the whole area belongs to Felda. I took judicial notice of the fact that the Felda area is wide and public access is generally not restricted to Malaysians. The distinction here is important to appreciate whether the person was in the premise with consent or without consent first to attract trespass as opposed to criminal trespass. Essentially, it is one related to the sensible judgment on the part of the police which was lacking in this case. The fact that the Felda manager lodges a report

cannot give rise to reasonable suspicion that an offence has been committed without the police doing further investigation more so when at the time of the arrest, the occupant of the premise in the Felda land had said that the respondent had the permission to be in the premise. *The absence of permission is the essence for trespass and consent will vitiate any investigation for criminal trespass* (emphasis added.) Support for the proposition is found in a number of Indian decisions which has pari materia provisions.

[29] Enforcement agencies must note that the penal provisions are not meant to be abused in breach of fundamental rights of citizens. When penal provisions are abused, it attracts the jurisprudence set out in the locus classicus case of *Rookes appellant; and Barnard and others respondents* [1964] AC 1129 which has been accepted and adopted in India as well as Malaysia in a number of cases (see *Nurasmira Maulat bt Abd Jaffar & Ors v Ketua Polis Negara & Ors* [2015] 3 MLJ 105; [2015] 2 CLJ 231; *Selvaduray v Chinniah* [1939] MLJ 253; *Wong Sieng Ping v Public Prosecutor* [1967] 1 MLJ 56).

[30] Basically, a police report per se cannot give rise to reasonable suspicion (see *Shaaban & Ors v Chong Fook Kam & Anor* [1969] 2 MLJ 219; *Zainal bin Kuning & Ors v Chan Sin Mian Michael & Anor* [1996] 3 SLR 121). It is only upon investigation that the issue of reasonable suspicion can come to the aid of the police, to enable them to arrest. As the criminal law stands in India and Malaysia, there is no provision to arrest first and investigate in offences of this nature. Before an arrest can take place, the police must have investigated and/or have some credible evidence to attract and to suspect 'reasonable suspicion' which is a *sine qua non* for arrest and detention (see ss 107, 110 as well as s 117 of the CPC).

[31] The grounds for 'reason to suspect' and/or reasonable suspicion can come from the information of the person who is lodging the report or from other witnesses upon investigation. Sections 110 and 117 as well as ss 387–388 of the CPC (bail provisions), when read together place safe guard to any arrested person to be released on bail to ensure that he is not detained by the police or by an order of remand by magistrate if it is not a serious offence in nature such as theft, robbery, murder, etc (common law offences) though it may be a seizable offence. In this respect, the background of the person plays an important role, for example, professionals, graduates, NGOs, etc when it is not related to common law offences. The distinction is vital to ensure that the criminal process is not abused, to suppress fundamental rights, etc magistrates are required to be vigilant before ordering remand. Sections 110, 117, 387–388 read as follows:

110 Procedure where seizable offence suspected.

(1) If from information received or otherwise a police officer not below the rank of

Sergeant or an officer in charge of a police station has reason to suspect the commission of a seizable offence he shall, unless the offence is of a character which the Public Prosecutor has directed need not be reported to him, immediately send a report of the same to the Public Prosecutor, and shall proceed in person or shall depute one of his subordinate officers to proceed to the spot to inquire into the facts and circumstances of the case and to take such measures as may be necessary for the discovery and, where not inexpedient, arrest of the offender:

Provided as follows –

(a) when any information as to the commission of any such offence is given against any person by name and the case is not of a serious nature the police officer receiving the same need not proceed in person or depute a subordinate officer to make an enquiry on the spot;

(b) if it appears to the police officer receiving the information that there is no sufficient ground for proceeding or further proceeding matter in the matter he shall not do so.

(2) In each of the cases mentioned in paragraphs (a) and (b) the police officer receiving the information shall state in his said report, if any, his reasons for not fully complying with subsection (1).

(3) Where a police officer exercises the power of deputation given by subsection (1) the subordinate officer so deputed shall not be entitled to use any of the powers given by sections 111, 112, 116 and 117.

117 Procedure where investigation cannot be completed within twenty-four hours

(1) Whenever any person is arrested and detained in custody and it appears that the investigation cannot be completed within the period of twenty-four hours fixed by section 28 and there are grounds for believing that the accusation or information is well founded the police officer making the investigation shall immediately transmit to a Magistrate a copy of the entries in the diary hereinafter prescribed relating to the case and shall at the same time produce the accused before the Magistrate.

(2) The Magistrate before whom an accused person is produced under this section may, whether he has or has no jurisdiction to try the case, authorize the detention of the accused in such custody as follows:

(a) if the offence which is being investigated is punishable with imprisonment of less than fourteen years, the detention shall not be more than four days on the first application and shall not be more than three days on the second application; or

(b) if the offence which is being investigated is punishable with death or imprisonment of fourteen years or more, the detention shall not be more than seven days on the first application and shall not be more than seven days on the second application.

(3) The officer making the investigation shall state in the copy of the entries in the diary referred to in subsection (1), any period of detention of the accused immediately prior to the application, whether or not such detention relates to the application.

(4) The Magistrate, in deciding the period of detention of the accused person, shall take into consideration any detention period immediately prior to the application, whether or not such detention relates to the application.

(5) The Magistrate in deciding the period of detention of the accused shall allow representations to be made either by the accused himself or through a counsel of his choice.

(6) If the Magistrate has no jurisdiction to try the case and considers further detention unnecessary he may order the accused person to be produced before a Magistrate having such jurisdiction or, if the case is triable only by the High Court, before himself or another Magistrate having jurisdiction with a view to transmission for trial by the High Court.

(7) A Magistrate authorizing under this section detention in the custody of the police shall record his reasons for so doing.

387 When person may be released on bail.

(1) When any person other than a person accused of a non-bailable offence is arrested or detained without warrant by a police officer or appears or is brought before a Court and is prepared at any time while in the custody of the officer or at any stage of the proceedings before the Court to give bail, that person shall be released on bail by any police officer in charge of a police station or by any police officer not under the rank of Corporal or by that Court.

(2) The police officer or the Court, if he or it thinks fit, may instead of taking bail from that person, discharge him on his executing a bond without sureties for his appearance as hereinafter provided.

388 When person accused of non-bailable offence may be released on bail.

(1) When any person accused of any non-bailable offence is arrested or detained without warrant by a police officer or appears or is brought before a Court, he may be released on bail by the officer in charge of the police district or by that Court, but he shall not be so released if there appears reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life:

Provided that the Court may direct that any person under the age of sixteen years or any woman or any sick or infirm person accused of such an offence be released on bail.

(2) If it appears to such officer or Court at any stage of the investigation, inquiry or trial, as the case may be, that there are not reasonable grounds for believing that the accused has committed a non-bailable offence, but there are sufficient grounds for further inquiry into his guilt, the accused shall, pending such inquiry, be released on bail, or at the discretion of that officer or Court, on the execution by him of a bond without sureties for his appearance as hereinafter provided.

(3) An officer or a Court releasing any person on bail under subsection (1) or (2) shall record in writing the reasons for so doing.

(4) If at any time after the conclusion of the trial of a person accused of a non-bailable offence and before judgment is delivered, the Court is of opinion that

there are reasonable grounds for believing that the accused is not guilty of the offence, it shall release the accused, if he is in custody, on the execution by him of a bond without sureties for his appearance to hear judgment delivered.

(5) Any Court may at any subsequent stage of any proceeding under this Code cause any person who has been released under this section to be arrested and may commit him to custody.

[32] Section 110 is not meant to stand as a mechanical process for the police to arrest a citizen and detain them and obtain a remand order from the magistrate to justify their arrest and remand, in cases when common sense will dictate that police ought to have granted bail upon arrest and investigate without the need to remand the suspect in the police cell. Arrest and securing remand orders on the facts of the case without instantly granting bail is an abuse of criminal process which no civilised jurisdiction will entertain. Wrongful arrest or detention will give rise to a claim for exemplary damages which in fact will impinge on public purse. In consequence, magistrates should be slow to provide remand orders at the behest of the application of the police when the alleged offence can be dealt with by police bail, etc whether it is seizable and/or non-seizable offence. It all depends on the facts and nature of the offence and the public standing of the purported offender, etc. Enforcement agencies as well as remand magistrate must note, it is well settled in jurisprudence the grant of bail is the rule and refusal is the exception. It is an elementary jurisprudence to ensure the criminal process is not abused. Learned authors *Janab's Key To Criminal Procedure* (3rd Ed) on this area of jurisprudence at pp 93–94 had this to say:

The words 'offence' and 'case' both under the definition for 'seizable offence', 'seizable case' 'non-seizable offence', non-seizable case' have similar meaning, and the issue being whether a warrant is necessary for the arrest. The phrase seizable offence, seizable case appears to be used interchangeably. So is the phrase non-seizable offence and non-seizable case.

'Bail' in a simple language means security taken from a person to appear on a fixed date before a court. The meaning of the word bail as ordinarily and commonly understood is to set free a person who is under arrest, detention or is under some kind of restraint by taking security for his appearance.

The word 'bail' is not defined in the code. Generally it means to set at liberty a person arrested or imprisoned, on security being taken for his appearance. In *Emperor v Hutchinson* AIR (1931) All 356 Mukherji J observed:

The principle to be deduced from ss 496 and 497, criminal procedure code, therefore, is that grant of bail is the rule and refusal is the exception. That this must be so is not at all difficult to see. An accused person is presumed under the law to be innocent till his guilt is proved. As a presumably innocent person, he is entitled to freedom and every opportunity to look after his own case. It goes without saying that an accused person, if he enjoys freedom, will be in a much

better position to look after his case and to properly defend himself than if he was in custody.

In *Hussainara Khatoon v State of Bihar* 1979 AIR 1360 Bhagwati J observed:

> It is not uncommon to find that under-trial prisoners who are produced before the Magistrates are unaware of their right to obtain release on bail and on account of their poverty, they are unable to engage a lawyer who would apprise them of their right to apply for bail and help them to secure release on bail by making a proper application to the Magistrate in that behalf. Sometimes the Magistrates also refuse to release the under-trial prisoners produced before them on their personal bond but insist on monetary bail with sureties, which by reason of their poverty the under-trial prisoners are unable to furnish and which, therefore, effectively shuts out for them any possibility of release from pre trial detention. This unfortunate situation cries aloud for introduction of an adequate and comprehensive legal service programme, but so far, these cries do not seem to have revoked any response.

And at p 99:

> Under s 388 of the code a person is not entitled to bail as of right in a non-bailable offence. It is subject to the discretion of the officer in charge of the police district or the court, which discretion must be exercised judicially.

And at p 100:

> Factors for granting or refusing bail is set out below. They are merely illustrative and should not be treated as exhaustive:
>
> (a) the nature and gravity of offence;
>
> (b) the enormity of the charge;
>
> (c) the severity of the punishment prescribed;
>
> (d) the nature of evidence in support of accusation;
>
> (e) the probability of accused absconding, if released on bail;
>
> (f) the likelihood of witnesses being tampered with or terrorised;
>
> (g) the danger of offence being repeated or continued;
>
> (h) the delay likely to be occasioned in trial;
>
> (i) the opportunity to the accused to prepare his defence;
>
> (j) age, sex, health, background, antecedents and character of the accused;
>
> (k) circumstances under which the offence was committed;
>
> (l) period for which the accused remained in custody;
>
> (m) position and status of the accused with reference to the victim and witnesses;

(n) character of the evidence against the accused;

(o) larger interests of public, etc. Cases like *Manickam & Ors v Public Prosecutor* [1982] 1 MLJ 227; *Dato' Mat Shah v Public Prosecutor* [1991] 2 MLJ 125; *Public Prosecutor v Wee Swee Siang* [1948] MLJ 114, are instructive.

[33] The safeguards under ss 110 and 117 as well as ss 387–388 and also advocated in case laws are matter which need to be considered at the time of arrest by the police as well as at the time the magistrate exercises the discretion to order a remand to ensure criminal process is not abused, taking into consideration a person is innocent until proven guilty. Failure to exercise the powers under ss 110, 387–388 and/or 117 according to the spirit and intent of the constitutional framework may result in a civil cause of action as in the instant case, warranting general damages, aggravated damages as well as exemplary damages. It must be noted that a s 117 remand requires the magistrate to be satisfied that 'the accusation or information is well founded' by the police. It is an objective test. To sustain rule of law, the statutory safeguards must be followed strictly. This was not done in this case.

[34] The facts of the instant case is not related to crime in the ordinary sense such as theft, robbery, murder, etc; and it is more related to the exercise of fundamental rights such as freedom of speech, assembly, etc. In this case, it is an undisputed fact that it was within the knowledge of the police ie the appellant at the time of the respondent arrest, resulting from the investigation done before the arrest, there was consent given by the occupiers for the lawful presence of the plaintiff.

[35] Learned authors of *Nandi – Criminal Ready Reference* Vol 1 p 1524 on the need to grant bail as a constitutional requirement at the point of arrest as well as at the time of seeking remand order and/or when the person is charged had this to say:

> Art 21 of the Constitution provides that no person shall be deprived of his personal liberty except according the procedure established by law. The Code of Criminal Procedure, 1973 is one of such procedural law. Art 22 casts certain obligations on the authorities in the event of arrest of an individual accused. In cases of under-trials the court is generally called upon to decide whether to release him on bail or to commit him to jail. The decision has to be made mainly in non-bailable cases, having regard to the nature of the crime, the circumstances in which it was committed, the background of the accused, the possibility of his jumping bail, the impact that his release may make on the prosecution witnesses, its impact on society and the possibility of retribution, etc – *State Of Maharashtra vs Captain Buddhikota Subha Rao* 1989 AIR 2292 (para 7): 1989 Cr LJ 2117.
>
> Grant of bail is the discretion of the court. But such discretion should be exercised in a judicious manner and not as a matter of course. Order of bail bereft of any

A cognet reason cannot be sustained – *Ram Govind Upadhyay vs Sudarshan Singh & Ors* (2002) 3 SCC 598.

[36] I do not think it is necessary to deal with the said sections in the Penal Code when it is well established that to commit an offence under this section and to attract 'reason to suspect' or what we often say as reasonable suspicion the police must be satisfied, not only the accused entered upon the property in the possession of the complainant, but they did so with an intent to commit an offence or to intimidate, insult or annoy any person in possession of such property. If sensible judgment by the police has been applied in this case, they would have come to the conclusion that there was consent by the person in possession and/or constructive possession of the premise, notwithstanding that they may not be owners of the property and in consequence a report to attract this section will be frivolous, vexatious and abuse of criminal process. This is exactly what happened in this case and the police did not even proceed to prosecute against the complaint.

[37] The learned High Court judge's conclusion on the facts that there was no recognisable offence committed by the appellants is correct in jurisprudence. I do not find any appealable error save as to the amount of general damages in the sum of RM300,000 which was not proven and I only allowed general damages of RM5,000. However, I would have allowed if such a sum is claimed under the head of exemplary damages. As there was no appeal as to exemplary damages, I sustained the sum of RM50,000.

[38] For reasons stated above, I will allow the appeal partly with a note that my learned brother and sister by majority have allowed the appeal and set aside the order of the High Court in full.

I hereby ordered so.

Appeal allowed.

Reported by Afiq Mohamad